55 Liberty Owners Corp., Employer-Petitioner and Local 32B-32J, Service Employees International Union, AFL-CIO

91st Street Tenant's Corp., Employer-Petitioner and Local 32B-32J, Service Employees International Union, AFL-CIO

Dak Equities Corp. and Jadam Equities, Employer-Petitioner *and* Local 32B-32J, Service Employees International Union, AFL-CIO

61 West 9 Tenants Corp. and Big City Management, Employer-Petitioner and Local 32B-32J, Service Employees International Union, AFL—CIO

3 Hanover Square Owners Corp. and J. C. Klein, Inc., Employer-Petitioner and Local 32B-32J, Service Employees International Union, AFL—CIO. Cases 19–UC–571 (formerly 2–UC–450), 19–UC–572 (formerly 2–UC–451), 19–UC–573 (formerly 2–UC–455), 19–UC–574 (formerly 2–UC–456), and 19–UC–575 (formerly 2–UC–457)

August 14, 1995

DECISION ON REVIEW AND ORDER

By Members Stephens, Cohen, and Truesdale

The Acting Regional Director for Region 19 issued a Decision and Order Clarifying Unit in Cases 19–UC–574, 19–UC–573, and 19–UC–575 on July 27, 1994; in Case 19–UC–572 on July 28, 1994; and in Case 19–UC–571 on December 19, 1994. The Acting Regional Director found in all five cases that doorpersons, concierge/doorpersons, or concierge/doorpersons/porters (doorpersons) or elevator operators in certain New York City residential cooperative or condominium buildings are guards within the meaning of Section 9(b)(3) of the Act and therefore should be excluded from the existing units.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Union filed timely requests for review of the Acting Regional Director's decisions in Cases 19-UC-571, 19-UC-572, 19-UC-573, 19-UC-574, and 19-UC-575, contending that doorpersons and elevator operators are not statutory guards, and that the doorpersons/porters in Cases 19-UC-571 and 19-UC-575 should be included in the unit as dual function employees in the event that the Board affirms the Acting Regional Director. In Case 19-UC-571, the Union also contended that the Board improperly asserted jurisdiction over the Employer. The Employer filed an opposition brief. Service Employees International Union submitted an amicus brief in support of Local 32B-32J. The Union also filed a motion for oral argument and motions to consolidate all five cases² as presenting common issues of law and fact. Service Employees International Union filed an amicus brief in support of the Union's motions to consolidate cases.³ The Employer filed oppositions to these motions.

On April 4, 1995, the Board granted the Union's requests for review solely with respect to the guard status of doorpersons and elevator operators.⁴ The Board also granted the Union's motions to consolidate the cases, and denied the Union's motion for oral argument.⁵

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in these cases with respect to the issues on review and has decided to reverse the Acting Regional Director's conclusions and to find that the doorpersons and elevator operators are not guards within the meaning of Section 9(b)(3) of the Act.

The facts in each of the five cases on review are similar, with some minor factual variations, as set forth below. In all five cases, the doorpersons or elevator operators monitor and regulate access into the building, deny entrance to unauthorized persons, and observe and report irregularities. The doorpersons and elevator operators receive deliveries when residents are not home, storing them in a room or an area off the lobby.⁶ In Cases 19–UC–571, 19–UC–572, and 19–UC–575 the doorpersons have visitors and/or delivery-persons and contractors sign a log-in book. None of

¹The Union filed one request for review in Cases 19–UC–572, 19–UC–573, 19–UC–574, and 19–UC–575, and another in Case 19–UC–571

²The Union's motions also requested consolidation with Case 2-UC-458, another case involving similar facts. In that case, the Regional Director for Region 2 issued a Decision and Order dated November 3, 1994, finding doorpersons for a building consisting of 95 residential cooperatives and several commercial condominiums not to be guards. The Employer also filed a timely request for review in Case 2-UC-458, contending that, contrary to the Regional Director, doorpersons are statutory guards, and that the superintendent is a supervisor. The Union filed an opposition brief. In its Order dated April 4, 1995 (discussed further, infra), the Board granted the Employer's request for review solely with respect to the guard status of doorpersons and denied review of the Regional Director's finding that the superintendent is not a supervisor. On June 8, 1995, the Employer requested that the Acting Executive Secretary permit it to withdraw its request for review in Case 2-UC-458. On July 13, 1995, the Board granted the Employer's request to withdraw with respect to those matters still pending.

³This amicus did not refer to Case 19–UC–571, as the Union's motion to consolidate that case with the other five cases had not yet been filed

⁴ Member Truesdale, dissenting in part, would have granted review in Cases 19–UC–571 and 19–UC–575 regarding whether doorpersons who also work as porters should be included in the unit as dual function employees in the event that the Board affirms the Acting Regional Director's finding that the disputed classifications are statutory guards.

⁵ Member Truesdale would have declined to rule on the Union's motion for oral argument at that time.

⁶The elevator operators in Case 19-UC-575 also hang cleaning deliveries on the door of the tenant's apartment.

the disputed classifications carry weapons or are authorized to engage in physical contact with unauthorized individuals. They do not wear uniforms, badges, or other insignia designating them as security personnel; are not deputized; and are not registered under state security law. None make rounds of the buildings, and there is no evidence that any have training in the field of security or are required to be bonded. There are no other security guards on the premises.⁷

There are some factual variations among the five cases. In Case 19-UC-572, doorpersons for 91st Street Tenant's Corp., a 38-unit cooperative, are expected to open doors for tenants as they enter and exit the building. They also perform some minor cleaning functions.8 Although there is always a doorperson on duty from 8 a.m. to midnight, there is no doorperson on duty from midnight until 8 a.m.9 Also, during lunch and rest breaks, doorpersons lock the interior set of doors and post a sign indicating that they will return shortly. During these periods, or when a doorperson is out due to illness and is not replaced, callers may enter the vestibule through the unlocked exterior doors and contact residents directly via the intercom. Residents can activate a mechanism, which briefly unlocks the interior doors, allowing visitors entry to the building.

In Case 19–UC–574, 61 West 9 Tenants Corp., a 61-unit cooperative, has one of its three doorpersons on duty from 2 p.m. to 6 a.m., Monday through Saturday, and around-the-clock on Sunday. Thus, from 6 a.m. to 2 p.m., Monday through Saturday, there is no doorperson on duty. 10 Doorpersons note deliveries and other information in a notebook. Copies of residents' keys are kept in a locked closet off the lobby to which doorpersons have access; they may release them only upon authorization of the resident or superintendent. Doorpersons help tenants with packages, hold elevator doors, and open doors for tenants and visitors if it is convenient. Doorpersons sometimes handle luggage for tenants, should a tenant need the assistance. Although

they have no assigned cleaning duties, if something were to spill in the lobby, they would clean it up.

The four elevator operators in Case 19-UC-573 provide around-the-clock coverage, 7 days per week, at Dak Equities Corp. and Jadam Equities, a rental apartment.¹¹ Their work station is the passenger elevator of the building. No one is able to gain access to the building without contact with the elevator operators. Visitors, delivery persons, or contractors press a button located beside the exterior doors to summon the elevator operators.¹² Upon being summoned, the elevator operator goes to the exterior doors, opens the door, and determines the nature of the person's business. As there is no intrabuilding communication system, the elevator operator cannot alert a tenant to the appearance of a visitor or delivery person.¹³ Instead, the elevator operator remains with the visitor until assured the tenant is home and the individual is authorized. If the tenant is not home, the elevator operator escorts the individual to the lobby and ensures that the individual exits the building. Elevator operators are instructed not to leave the elevator, because the elevators are manually operated.14 Should an unauthorized individual refuse to leave, the elevator operator summons either the superintendent or the police.15 When contractors seek building access, the operator determines their purpose and authorization. If there is any question, the operator refuses to permit access until obtaining clearance from the superintendent.

Elevator operators have minor cleaning duties, which include cleaning the gang station at the elevator and the saddle in the lobby. They are not expected to open doors for tenants. They are expected to learn the names of tenants who live in the building.

In Case 19–UC–575, 3 Hanover Square Owner's Corp./J.C. Klein, Inc. has three doorpersons and two doorperson/porters who are on duty around-the-clock at its 205-unit residential cooperative. ¹⁶ The main en-

⁷In Case 19–UC–572, the doorpersons have walkie-talkies by which they may contact a service (Interwatch) that calls the police emergency line. The Union claims that Interwatch is the Employer's outside security service, but there is nothing in the record to support this.

⁸The doorpersons on the day shift (8 a.m. to 4 p.m.) clean the front door windows once a week; those on the evening shift (4 p.m. to midnight) mop the lobby before leaving.

⁹The building entrance consists of two sets of doors that is a vestibule; there is a service entrance that remains closed. The doorpersons station themselves in the vestibule or lobby, and use an intercom to communicate with residents to obtain authorization for visitors.

¹⁰ The doorpersons stand or sit either inside the exterior doors to the main entrance (these remain locked except from around 11 p.m. or midnight until 6 a.m., and when no doorperson is on duty) or inside the interior doors (which remain locked except when no doorperson is on duty) at a lectern in front of a glass panel. They use an intercom system to announce guests.

¹¹ If absent, they are replaced.

¹² There are two entrances to the building. One is a locked back door in a basement courtyard. The main entrance consists of two sets of doors. The first set of doors off the street remains locked. Upon passing through these doors into the building, one enters a vestibule bounded by a second set of doors that remains unlocked. Then one enters the lobby and a narrow corridor leading to the passenger elevator, which is approximately 15 feet from the interior doors. Tenants have keys to the exterior doors.

¹³ The Employer indicated it was in the process of installing an intrabuilding intercom system to be completed within 60 days of the hearing.

¹⁴ A new automatic elevator was recently installed.

¹⁵ There is a dedicated telephone line that connects a telephone in the elevator directly to the Employer's office. Elevator operators may also use the superintendent's basement telephone to call the police directly.

¹⁶ One doorperson/porter works one 8-hour shift as a porter and four 8-hour shifts as a doorperson. The other works three 8-hour shifts as a porter and two 8-hour shifts as a doorperson. On the days they work as porters they perform only cleaning functions.

trance consists of two sets of doors, both kept unlocked. 17 The doorperson is located at the desk in the lobby. Doorpersons use an intercom system to announce visitors (a sign in the lobby advises callers that all visitors must be announced). The doorpersons are also expected to view the surveillance monitors at their desk, which are connected to six cameras located at various locations in and around the building. The record does not show precisely what this duty entails, except that the doorpersons observe and report irregularities and do not respond themselves, and if the doorperson views someone at the backdoor whom the doorperson does not recognize, the doorperson will ask them to identify themselves. The doorpersons greet tenants and guests and, on occasion, handle luggage.

In Case 19-UC-571, 55 Liberty Owners Corp. has four doorpersons and one porter/doorperson at its 87unit cooperative.¹⁸ A doorperson is on duty aroundthe-clock at a station about 40 feet from the entrance.¹⁹ The doorpersons monitor three surveillance cameras; one faces the service entrance door; another faces the door leading to the basement; and the third faces a staircase. Doorpersons have access to tenants' keys that are kept in a cabinet at the station. There is a posted no-loitering and no-smoking rule, which the doorpersons are expected to enforce, although the record does not show how this is enforced. Doorpersons are expected to greet tenants, be courteous, hold elevator doors under certain circumstances, and notify tenants upon request about when their mail is delivered.

The Acting Regional Director found in all five cases that the doorpersons or elevator operators are guards because their primary responsibility is to safeguard the Employers' property and residents by monitoring and regulating access to the building and by denying entry to unauthorized persons. Although he noted that the doorpersons' primary role is not to enforce rules directed at employees, the Acting Regional Director concluded that their responsibility to protect the Employer's property necessarily would include the protection of the property against all others. The Acting Regional Director found it immaterial that these employees are neither armed nor deputized and possess no authority personally to compel compliance with the rules of the Employers; it is sufficient that they observe and report infractions.

The Union in its requests for review and brief on review claims that the doorpersons and elevator operators are primarily performing service-oriented functions expected in New York City middle and upper-middle class residential buildings and that any purported function to protect the property of their respective employers or safety of persons would be, at best, incidental to their primary duties. The Union argues that no conflict of loyalty is presented by the facts of these cases.

Section 9(b)(3) of the Act defines a guard as "any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." Although the doorpersons and elevator operators perform certain guard-like functions, we find, contrary to the Acting Regional Director, that the doorpersons and elevator operators are not guards as defined by Section 9(b)(3) of the Act. Rather, we find that any guard-like functions performed are incidental to their primary function of providing courtesy oriented and receptionist type services to the tenants of the various buildings. See Tac/Temps, 314 NLRB 1142 (1994). In this regard, the doorpersons and elevator operators announce visitors, deliverypersons, and contractors; accept deliveries and messages; and, in most of the cases, open doors or assist with packages or luggage as needed. The doorpersons and elevator operators do not make rounds, are not trained in security, are not armed, are instructed not to use physical force, and do not present themselves as guards in their appearance. They do not perform other guard-like functions such as checking suspicious packages or asking off-duty employees to leave. Their guard-like functions of asking unauthorized persons to leave (or enforcing in some manner the no-loitering and no-smoking rules in Case 19-UC-571)²⁰ are incidental to their primary nonguard duties and there is no other evidence that the doorpersons enforce rules against employees or other persons to protect the safety of persons on the premises or the property itself. Accordingly, the doorpersons and elevator operators here are not employed as guards whose functions by their nature render them to be guards under Section 9(b)(3).

We find this case to be similar to *Ford Motor Co.*, 116 NLRB 1995 (1956).²¹ In that case, the Board found a receptionist not to be a guard, notwithstanding that some of her functions appeared to be even more guard-like than those of the doorpersons or elevator operators in the instant cases. The receptionist did not permit unauthorized employees to pass through the

¹⁷ There is also a rear door that is kept locked.

¹⁸The porter/doorperson works one 8-hour shift per week as a doorperson and four 8-hour shifts as a porter.

¹⁹The graveyard doorperson does not leave the station for lunch breaks. If that doorperson must leave briefly, the doorperson locks the exterior doors and posts a sign notifying visitors of her or his imminent return. Day and evening doorpersons are relieved during lunch by the porter or porter/doorperson. Only another doorperson may substitute for a doorperson on sick leave.

²⁰Enforcement of a no-smoking rule does not warrant a finding that doorpersons are statutory guards. *Burns Security Services*, 300 NLRB 298, 299 (1990), enf. denied sub nom. *BPS Guard Services v. NLRB*, 942 F.2d 519 (8th Cir. 1991).

²¹ This case was cited with approval in *Hoffman Security*, 302 NLRB 922 (1991).

lobbies, immediately reported to her supervisor any violation of company security rules and regulations, checked in and issued passes to all vendors and visitors, and required clearance passes for all incoming and outgoing packages. Moreover, a plant guard performed the same duties as the receptionist on shifts when she was not present, and the receptionist was an employee of the security department and under the same supervision as the plant guards. These facts were found insufficient to establish that the receptionist was a guard.

For the reasons stated above, we conclude that the doorpersons and elevator operators are not guards within the meaning of Section 9(b)(3) of the Act.²²

Accordingly, the Acting Regional Director's findings of guard status in Cases 19–UC–571, 19–UC–572, 19–UC–573, 19–UC–574, and 19–UC–575 are reversed, and the disputed classifications remain included in the unit.

ORDER

IT IS ORDERED that the Acting Regional Director's findings in Cases 19–UC–571, 19–UC–572, 19–UC–573, 19–UC–574, and 19–UC–575 that the doorpersons, concierge/doorpersons /porters, and elevator operators are guards within the meaning of Section 9(b)(3) of the Act are reversed, and the disputed classifications remain included in the units

²² Member Truesdale finds it unnecessary to pass on whether the doorpersons in Cases 19–UC–571 and 19–UC–575 who also work as porters should be included in the unit as dual function employees.